

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA

v.

RUDOLPH EUGENE FALASCO

CRIMINAL ACTION
NO. 85-417-01

MEMORANDUM

Broderick, J.

September , 1999

On May 6, 1986 Rudolph Eugene Falasco ("Falasco") entered a plea of guilty to three counts of possession of stolen mail, in violation of 18 U.S.C. § 1708. On July 30, 1986, this Court sentenced Falasco to a term of five years imprisonment on Count 1, two years imprisonment on Count 2, and a five year term of probation on Count 3. Following a petition for revocation of probation, this Court, after a hearing, revoked Falasco's probation on November 30, 1994 and sentenced Falasco to a term of five years imprisonment to run consecutive to "all sentences heretofore imposed."

Currently before the Court is Falasco's motion, through counsel, to correct this Court's "illegal" sentence of November 30, 1994 pursuant to the "old" version of Federal Rule of Criminal Procedure 35(a). Also before the Court is Falasco's motion for bail. For the reasons stated below, the Court has determined that the November 30, 1994 sentence was legal and, thus, will deny Falasco's motions.

The offenses committed by Mr. Falasco which led to this Court's original sentence of July 30, 1986 were all committed prior to November 1, 1987. Although Mr. Falasco is challenging the sentence imposed by this Court on November 30, 1994 when Mr. Falasco's probation was revoked, the law in effect at the time of Mr. Falasco's original offense controls this Court's determination of the legality of the revocation of Mr. Falasco's probation. See, e.g. United States v. DeRewal, 66 F.3d 52, 54 (3d Cir. 1995) (applying the version of 18 U.S.C. § 3651 applicable to offenses committed prior to November 1, 1988 where the petition for revocation of the defendant's probation was not filed until September 7, 1994). For offenses committed prior to November 1, 1987 Federal Rule of Criminal Procedure 35(a) provides:

(a) Correction of Sentence. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.

Thus, if the Court finds that the sentence imposed by this Court on November 30, 1994 was illegal the Court has the authority to correct that sentence despite Mr. Falasco's delay in bringing this challenge.

Mr. Falasco challenges this Court's sentence of November 30, 1994 on two bases. First, Mr. Falasco argues that the Court did not have the authority to revoke Mr. Falasco's probation in November 1994 because the term of probation had expired prior to the filing of the petition for revocation. In the alternative, Mr. Falasco argues that this Court did not have the authority to revoke probation for the same acts which also constituted a violation of Mr. Falasco's state and Federal parole terms. The Court will address these arguments in turn.

Mr. Falasco's contention that his term of probation had expired prior to the filing of a petition for revocation is based upon the Judgement and Commitment Order filed by this Court

on July 30, 1986. This Court's July 30, 1986 Judgment and Commitment Order reads, in pertinent part, as follows:

The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS on Count One.

On Count Two, IT IS ADJUDGED that the Defendant is committed to the custody of Attorney General or his authorized representative for a period of imprisonment for TWO (2) YEARS, said term of imprisonment to run consecutive to the sentence of imprisonment on Count One.

On Count Three, IT IS ADJUDGED that the imposition of sentence as to imprisonment only is suspended, and the Defendant is placed on probation for a period of FIVE (5) YEARS on the following terms and conditions: (1) that he obey all local, state and federal laws; (2) that he comply with the rules and regulations of the Probation Department, and (3) that he participate in any program or programs the Probation Department in its discretion thinks would be beneficial to the Defendant.

Mr. Falasco contends that, since the Judgment and Commitment Order says nothing as to when the term of probation imposed on Count Three shall commence, the term of probation presumptively began running on the date of the imposition of the sentence. Mr. Falasco further contends that the term of probation imposed on Count Three expired on July 29, 1991, six months before the Probation Officer sought a probation violation warrant in January 1992. Therefore, Mr. Falasco concludes that this Court was without jurisdiction to revoke his probation in November 1994, more than two years after his term of probation expired.

The Court, after reviewing the transcript of the July 30, 1986 sentencing, has determined that Mr. Falasco's contention is without merit. The transcript of the July 30, 1986 sentencing shows that the Court imposed sentence as to Count 3 as follows:

On Count three, it is adjudged that the imposition of sentence as to imprisonment only is suspended. And you're placed on probation for a period of

five years on the following terms and conditions:

1. That you obey all local, state and federal laws.
2. That you comply with the rules and regulations of the Probation Department, and
3. That you participate in any program or programs that the Probation Department in its discretion thinks would be beneficial to you.

The period of probation that I imposed in connection with this count three is to commence upon your release from imprisonment in connection with the sentences of imprisonment that I imposed in connection with Counts one and two.

(emphasis added). Thus, the Court, at the time of sentencing, in the presence of Mr. Falasco and his counsel, made clear, in imposing the sentence of a term of probation as to Count three, that the term of probation did not begin to run until after Mr. Falasco served the custodial sentences imposed as to Counts one and two. In the event of a conflict between the oral pronouncement of sentence made at the time of sentencing and the judgment filed by the Court, the oral pronouncement controls. United States v. Chasmer, 952 F.2d 50, 52 n.2 (3d Cir.), cert. denied 503 U.S. 997 (1991). Therefore, the Court's oral sentence which set the end of his term of incarceration as the time for commencement of Mr. Falasco's term of probation is the controlling one.

Mr. Falasco began serving his term of imprisonment in connection with this Court's July 30, 1986 sentence on the date it was imposed. According to the information provided by Mr. Falasco in the instant motion, he was paroled from Federal custody on February 25, 1990. Without making a determination as to whether Mr. Falasco's term of probation commenced while he was on parole from his sentence on Counts one and two, the Court notes that, under its July 30, 1986 sentence, the earliest possible date on which Mr. Falasco's probation could have commenced is February 25, 1990. Thus, the earliest date that Mr. Falasco's term of probation

could have expired was February 24, 1995. Mr. Falasco's probation was revoked on November 30, 1994. This date was well within Mr. Falasco's term of probation. The Court therefore rejects Mr. Falasco's contention that the November 30, 1994 sentence imposed after revocation of his probation was illegal for having been imposed after the expiration of his term of probation.

Having rejected Mr. Falasco's first argument challenging the legality of this Court's November 30, 1994 sentence, the Court will now address his alternative argument that this Court could not properly revoke probation for the same acts used to revoke Mr. Falasco's parole. Mr. Falasco argues that by revoking probation while an offender is on parole, the judiciary impermissibly invades the province of the executive branch of government.

The Court begins by noting that nowhere in either his motion for correction of an "illegal" sentence nor his motion for bail does Mr. Falasco assert that his Federal parole has ever been revoked. Rather, Mr. Falasco has provided the Court with a chronology regarding his terms of incarceration which, in relevant part, shows the following:

- On July 30, 1986 Mr. Falasco was sentenced by this Court and began serving his Federal sentence.
- In 1986 and 1987 Mr. Falasco was sentenced for separate offenses in Chester, Bucks and Montgomery Counties.
- On February 25, 1990 Mr. Falasco was paroled from Federal custody to State custody.
- On December 18, 1990 Mr. Falasco was paroled from State custody.
- In 1991 Mr. Falasco was arrested at least three times in various counties. As a result of these arrests, Mr. Falasco was arrested by State parole authorities on November 15, 1991. Also as a result of these arrests, an application for a probation violation warrant was filed by the United States Probation Department. Mr. Falasco was convicted and sentenced for these crimes in state court in July, 1992.
- On February 12, 1992 a probation violation warrant was lodged as a detainer by this Court.
- On March 1, 1993 Mr. Falasco's State parole was revoked and he was sentenced to serve a specified period of "backtime."
- On November 30, 1994 this Court revoked Mr. Falasco's probation, as a result of his criminal convictions in state court, and sentenced to five years imprisonment consecutive

- to all other sentences previously imposed.
On September 25, 1998 Mr. Falasco began serving the five year sentence imposed by this Court as a result of his violation of probation.

Thus, as an initial matter, this Court notes that Mr. Falasco has failed to demonstrate that his federal parole was revoked for the same acts which caused this Court to revoke his probation.

The Court finds this irrelevant, however, because even if Mr. Falasco could make such a showing, the Court, based upon controlling law, would still reject Mr. Falasco's argument as one without merit.

For his contention that a court may not revoke the probation of an offender who is under the jurisdiction of the United States Parole Commission, Mr. Falasco relies on United States v. Myers, 993 F.2d 1548 (6th Cir. 1993) (table), an unreported decision. Mr. Falasco fails to note that the Sixth Circuit, in United States v. Williams, 15 F.3d 1356, 1357 (6th Cir.), cert. denied, 513 U.S. 966 (1994), concluded that "a district court does have authority to revoke probation for pre-probation conduct, including the pre-probation conduct of a paroled convict." Mr. Falasco further fails to note that the United States Court of Appeals for the Third Circuit explicitly adopted the Williams approach in United States v. DeRewal, 66 F.3d 52 (3d Cir. 1995). In DeRewal, the defendant was sentenced to a term of ten years of imprisonment to be followed by a ten year term of special parole and then a five year term of probation. DeRewal, 66 F.3d at 53. The defendant was released from prison on parole in December 1992 with his parole to run until October 1998. Id. The term of special parole would run from 1998 to 2008 when the term of probation would begin. Id. A violation of probation petition was filed in September 1994 and, after a hearing, the district court revoked his probation and sentenced the defendant to thirty-six months imprisonment. Id. On appeal, the defendant challenged the authority of the district court

to revoke his probation for offenses which occurred prior to the commencement of his term of probation and while he was still on parole. DeRewal, 66 F.3d at 54. The Third Circuit, adopting the reasoning of the Sixth Circuit, affirmed, holding that "the district court properly exercised its jurisdiction in revoking DeRewal's probation for pre-probation conduct occurring during a period of parole. Such judicial action regarding probation does not disturb the executive branch's authority to control DeRewal's parole." DeRewal, 66 F.3d at 53. The Court found that revoking probation did not cause a conflict with the clemency function of the parole authorities because "revoking a probationary term which follows a term of incarceration does not stop the parole authorities from making such adjustments of the term of incarceration as they think appropriate." DeRewal, 66 F.3d at 55 (citing United States v. Camarata, 828 F.2d 974, 979 (3d Cir. 1987)) (citations omitted).

Thus, it is clear that the Third Circuit has rejected Mr. Falasco's argument that probation may not be revoked while an offender is on parole. To the extent that Mr. Falasco also challenges this Court's authority to revoke probation for the same acts that were, or could have been, used to revoke his parole, the Court rejects such a contention as well. It is well established that there is "no double jeopardy protection against revocation of probation and the imposition of imprisonment." United States v. DiFrancesco, 449 U.S. 117, 137 (1980). Therefore, this Court had the authority to revoke Mr. Falasco's probation, even though he was on parole at the time of the revocation and even though his parole could have been revoked for the same acts which led to the revocation of his probation.

Having rejected both of Mr. Falasco's asserted grounds challenging the illegality of this Court's November 30, 1994 sentence, the Court will deny Mr. Falasco's motion to correct his

"illegal" sentence pursuant to Federal Rule of Civil Procedure 35(a). The Court will also deny Mr. Falasco's motion for bail because, having upheld the legality of his sentence, the Court cannot find that he has raised "substantial constitutional claims upon which he has a high probability of success." Landano v. Rafferty, 970 F.2d 1230, 1239 (3d Cir. 1992).

An appropriate Order follows.

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ORDER

AND NOW, this day of September, 1999; Defendant Rudolph Eugene Falasco ("Falasco") having filed, through counsel, a motion entitled "Motion for Correction of Illegal Sentence Pursuant to the 'Old' Version of Rule 35(a) F.R.Crim.P." seeking Falasco's release from federal custody; Falasco also having filed a motion for bail; for the reasons stated in this Court's memorandum of this same date, the Court having determined that Falasco's sentence is lawful, no change in his sentence is warranted, and Falasco is therefore not entitled to bail;

IT IS ORDERED that Rudolph Eugene Falasco's motion for correction of illegal sentence (Document No. 44) is **DENIED**;

IT IS FURTHER ORDERED that Rudolph Eugene Falasco's motion for bail (Document No. 45) is **DENIED**.

RAYMOND J. BRODERICK, J.